# STATE OF MICHIGAN

# COURT OF APPEALS

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HOUSING PRODUCTS COMPANY,

Plaintiff/Cross-Defendant,

v

FLINT HOUSING COMMISSION,

Defendant/Cross-Plaintiff/Cross-Defendant-Appellant,

and

DEMARIA BUILDING COMPANY,

Defendant/Cross-Plaintiff/Cross-Defendant-Appellee,

and

HARTFORD FIRE INSURANCE COMPANY, and INTERIOR DESIGN,

Defendants-Cross-Defendants.

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UNPUBLISHED
November 15, 2002

No. 233605
Genesee Circuit Court
LC No. 97-060739-CK

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

In this construction case, defendant, Flint Housing Commission ("FHC"), appeals as of right from an order of judgment in favor of defendant, DeMaria Building Company ("DeMaria"), awarding DeMaria the balance of the contract payments and the cost of lumber, and pre-filing and prejudgment interest on those payments. We affirm.

## I. Facts

This case arises from the construction of Simmons Square Elderly Housing, a federally-subsidized apartment project for low-income elderly persons in the city of Flint that was completed on October 13, 1993. Four years after the project was completed, plaintiff, a supplier of drywall materials, filed suit against the project subcontractor, Interior Design; the project contractor, DeMaria; DeMaria's insurer, Hartford Fire Insurance Company; and the project owner, the FHC, alleging entitlement to payment of the remaining balance for the drywall material that it had supplied to Interior Design for the project.

DeMaria filed a cross-complaint against the FHC, alleging breach of contract for the FHC's failure to pay the contract balance of $244,662 and unjust enrichment for the FHC's failure to execute Change Order No. G-19 ("Change Order–19"), a document signed by the FHC to increase the contract price by an additional $233,919, for the unanticipated national increase in the cost of lumber and the extra expenses incurred when Interior Design failed to complete its work on the project. Following a five-day bench trial, the trial court ruled that DeMaria had no cause of action against the FHC except for (1) the remaining balance of the contract of $244,662; (2) the $60,358 in lumber costs under Change Order-19; (3) a five-percent pre-filing interest on the above two sums; and (4) a twelve-percent prejudgment interest on the above two sums effective December 17, 1997, the filing date of the complaint, until the judgment was satisfied. The trial court's order of judgment, entered March 23, 2001, also included pre-filing and prejudgment interests for the $311,622.20 final contract payment.[1]

## II. DeMaria's Entitlement to Additional Lumber Costs

The FHC argues that DeMaria's complaint did not sufficiently plead a claim under the equitable doctrines of waiver and estoppel with respect to the payments under Change Order-19, and that the two doctrines are inapplicable to the facts in this case.

With respect to the FHC's claim that the trial court erred in relying on the doctrines of waiver and estoppel because DeMaria's complaint did not sufficiently plead these claims, the FHC's argument section in its brief on appeal merely asserts that "[t]he FHC was unfairly prejudiced by that fact. This is an example of trial by ambush. Had [DeMaria] pled this claim, the FHC could have been better prepared to defend it." Beyond this statement, the FHC does not discuss or argue this claim. The FHC does not provide any further analysis of the facts in the instant case, or an explanation of the procedural development in the lower court proceedings, nor does the FHC analyze the law with respect to MCR 2.111(B). Generally, a party's failure to argue a position or failure to identify relevant authority waives the issue. *Oneida Twp v Eaton Co Drain Comm'r*, 198 Mich App 523, 526 n 2; 499 NW2d 390 (1993). An appellant may not merely announce its position and leave it to this Court to determine and rationalize the basis for its claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). This claim, therefore, is not properly preserved for appeal and is deemed waived.

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[1] The other actions between the parties were dismissed by the trial court and are not relevant to this appeal.

The FHC next argues that the doctrines of estoppel and waiver are inapplicable to the facts of the case. We review the trial court's decision de novo and review for clear error the findings of fact in support of the equitable decision rendered. *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999); *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997); MCR 2.613(C). Findings are clearly erroneous when, although there is evidence to support them, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

In the instant case, the trial court applied the equitable doctrine of waiver regarding the requirement of HUD's approval for Change Order-19.

> "To constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment. There must be an existing right and an intention to relinquish it, and there must be both knowledge of the existence of a right and an intention to relinquish it."
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> "A waiver exists only where one, with full knowledge of material facts, does or forbears to do something inconsistent with the existence of the right in question or his intention to rely on that right." [*Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718; 179 NW2d 252 (1970), citing 31 CJS, Estoppel, § 67, p 408.]

A waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance. *H J Tucker & Assocs v Allied Chucker & Eng'g Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999), citing *Fitzgerald, supra* at 718-719.

The trial court made the following findings of fact and conclusions of law: (1) it was undisputed that all parties understood that any changes to the contract were to be approved by HUD, (2) it was undisputed that all change orders in this case were not approved by HUD at the time the changes were made, but that change orders numbers one through seventeen were all approved by HUD after the fact, (3) HUD rejected Change Order No. 18, which was ultimately incorporated into Change Order-19, (4) Paragraph 10(d) of the general conditions of the contract provided for equitable adjustment in circumstances where the necessity to proceed with a change does not allow sufficient time to check a proposal, (5) the evidence showed that change orders in this case could not be approved by HUD within the thirty-day timeframe of the contract provisions because of bureaucracy, and that time was of the essence in the construction of the project, and (6) although there was a contractual provision requiring HUD approval for changes, the FHC and DeMaria were not precluded from waiving that requirement and undertaking changes by mutual consent.

We conclude from our review of the record that the court's findings of fact are consistent with the testimonial evidence presented by both the FHC and DeMaria. The evidence showed the knowledge of the existence of a right and an intention to relinquish it. *Fitzgerald, supra* at 718. Therefore, the FHC's claim that the equitable doctrine of waiver was inapplicable in this case is without merit.

Next, the trial court applied the doctrine of equitable estoppel and determined that DeMaria was entitled to the increased lumber costs. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998).

The trial court made the following findings of fact and conclusions of law with respect to the question of the extra lumber costs: (1) the contract was a fixed-price contract, (2) the cost of lumber escalated by forty to fifty-five percent in an unprecedented and an unanticipated manner as a result of a hurricane in Florida and a change in timber harvesting practices to protect the Spotted Owl, (3) although HUD declined to approve the increased costs, HUD Engineer Kenneth Peck opined that this expense was of such an unprecedented and unanticipated nature that HUD should approve it, (4) time was of the essence for the construction of the project, (5) the FHC had established a pattern of proceeding with the construction without first obtaining HUD's approval, and (6) the waiver for HUD's prior approval was implied. A review of the record shows that the trial court's findings were consistent with the evidentiary testimony presented at trial. The record supports the conclusion that (1) the FHC, by its previous pattern of practice and representations, induced DeMaria to believe that it would be paid for the extra lumber costs, (2) DeMaria justifiably relied and acted on that belief, and (3) DeMaria would have been prejudiced if the FHC were to be allowed to deny the existence of those facts. *West American Ins Co, supra* at 310. Therefore, the FHC's claim that the doctrine of equitable estoppel was inapplicable to the facts in the instant case is without merit.

III. The Award of Pre-Filing and Prejudgment Interest

The FHC argues that the trial court abused its discretion in awarding pre-filing interest on the $311,622.20 late payment because (1) DeMaria failed to plead the request for pre-filing interest in its complaint, (2) DeMaria was allowed to present this question at trial as an "ambush," (3) the trial court erred in determining that the payment was late, and (4) it was unclear on what authority the trial court relied in awarding the pre-filing interest. We find no abuse of discretion.

The award of pre-filing interest pursuant to MCL 438.7 is a matter within the trial court's discretion. *Cataldo v Winshall, Inc*, 3 Mich App 290, 295-296; 142 NW2d 28 (1966). An abuse of discretion will be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

The FHC's claims that DeMaria failed to plead in its complaint the request for pre-filing interest on the late payment, and that DeMaria was allowed to present this question at trial as an "ambush," are waived for appellate review for failure to properly brief this claim on appeal. *Eaton Co Drain Comm'r, supra* at 526 n 2.

With respect to the FHC's claim that the trial court erred in determining that the payment was late and that the evidence showed that application for the payment was submitted on January 22, 1997, and not October 30, 1994, as the trial court had determined, the record shows that the FHC's counsel expressly stipulated to DeMaria's calculations of the various pre-filing and

prejudgment interests, but not to DeMaria's entitlement to interest. Such calculations necessarily required specific dates. The date of October 30, 1994 as the date on which the pre-filing interest began to accrue was, in effect, expressly stipulated to by the FHC. In stipulating to such interest calculations and the dates on which they should begin, the FHC waived any challenge to the court's authority to use such dates. See, e.g., *Shultz v Northville Pub Schools*, 247 Mich App 178, 181 n 1; 635 NW2d 508 (2001), citing *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

With respect to the FHC's claim that it is unclear on what authority the trial court relied in awarding the five-percent pre-filing interest, a review of the record shows that Article Four of the contract expressly provides that "[a]ny monies not paid when due to either party under this Contract shall bear interest at the legal rate in force at the place of the project." In Michigan, the rate for pre-filing interest is governed by MCL 438.7 and MCL 438.31. Further, the trial court's ruling and the language of the order of judgment reflect that the trial court awarded this interest pursuant to MCL 438.7. Therefore, the FHC's claim that DeMaria was not entitled to interest on the $311,622.20 payment is without merit because the FHC fails to show that the trial court abused its discretion in this regard.

The FHC next argues that the trial court abused its discretion in determining October 30, 1994 as the beginning date for the five-percent interest on the contract balance amount of $244,662 and the cost of lumber in the amount of $60,358. As we previously noted, the FHC expressly stipulated to that date as part of DeMaria's calculations on the interest.

The FHC also argues that (1) the prejudgment interest on the contract balance was not payable until at least April 1998, (2) HUD never approved the payment for the increased cost in lumber, and the FHC was not liable for this payment until after the judgment was entered in the instant case, and (3) the allegedly late payment was not late because it was paid on March 15, 1997.

This Court reviews de novo an award of interest pursuant to MCL 600.6013. *Everett v Nickola*, 234 Mich App 632, 638; 599 NW2d 732 (1999). MCL 600.6013 is a remedial statute, which is to be liberally construed to give effect to its intent and purpose, *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 510; 475 NW2d 704 (1991), which is to compensate the prevailing party for the loss of use of the funds awarded as a money judgment and to offset the costs of litigation. *Farmers Ins Exchange v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002). Moreover, a "written contract" is a "written instrument" for purposes of applying MCL 600.6013(5). MCL 600.102; see *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346-347; 578 NW2d 274 (1998). An award of interest is mandatory in all cases to which the statute applies. *Farmers Ins Exchange, supra* at 460.

With respect to the FHC's assertion that the trial court erred in determining the date upon which the prejudgment interest of twelve percent was to begin on the contract balance, it fails for the same reasons previously discussed in this opinion. The FHC had expressly stipulated to that date, which was set at the time DeMaria filed its cross-complaint against the FHC.

With respect to the FHC's claim that the FHC did not become liable on the payment for the cost of lumber until judgment was rendered in this case, the increase in the cost of lumber was included in Change Order-19, a written instrument. The trial court determined that DeMaria

was entitled to the cost of lumber as specified under that written document. The FHC proffers no argument and provides no authority under which MCL 600.6013 should not mandatorily apply. Therefore, this argument fails.

Finally, with respect to the $311,622.20 payment, as previously noted, the trial court did not err in following the stipulation of the parties as to the date upon which the prejudgment interest should begin to accrue. We conclude that the trial court properly awarded prejudgment interest pursuant to MCL 600.6013.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald